U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: SEP 2 7 2013 OFFICE: TEXAS SERVICE CENTER FILE [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes its business as software service, consulting and "BPO." It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

At issue in this case is whether the beneficiary has the minimum experience required to perform the proffered position, as stated on the labor certification.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is September 9, 2011.[2]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in computer science, math, engineering, business or related.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: Computer science, math, engineering, business or related.
H.8. Alternate combination of education and experience: Master's degree and three years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 60 months in any suitable software engineering occupation.
H.14. Specific skills or other requirements: "Bachelor's degree (Computer Science, Math, Engineering, Business or related) plus 5 years progressively-responsible experience in BizTalk Server, C#, Visual Studio, Windows Server, and 3 years in BizTalk Business Activity Monitoring, BizTalk custom pipelines and custom adapters, SQL Server, VB.Net, and WCF, 2 years in Microsoft Host Integration Server, and 6 months in BizTalk MultiServer Environment, BizTalk Server Accelerator for Rosetta Net, Microsoft ISA Server, SharePoint Server, and SharePoint Services. In the alternative, employer will accept a related Masters degree plus 3 years experience in BizTalk Server, C#, Visual Studio, Windows Server, BizTalk Business Activity Monitoring, BizTalk custom pipelines and

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

custom adapters, SQL Server, VB.Net, and WCF, 2 years in Microsoft Host Integration Server and 6 months in BizTalk MultiServer Environment, BizTalk Server Accelerator for Rosetta Net, Microsoft ISA Server, SharePoint Server, and SharePoint Services."

Part J of the labor certification states that the beneficiary possesses a master's degree in engineering science from completed in 2004. The record contains a copy of the beneficiary's and transcripts from issued in 2004.

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- Software Engineer witl in Troy, Michigan from February 15, 2010 until September 10, 2010;
- Microsoft Tech Specialist with in Stamford, Connecticut from February 5, 2009 until January 22, 2010;
- BizTalk Developer with in Mountain View, California from May 7, 2008 until February 4, 2009; and
- Software Engineer witl n Troy, Michigan from April 1, 2005 until May 1, 2008.

The record contains an experience letter from the Vice President of stating that the beneficiary was employed as a software engineer from April 2005 to May 2008 and from March 2010 to September 2010; a letter from the Vice President of Operations of stating that the beneficiary was employed as a Microsoft Technologies Specialist from February 5, 2009 until January 22, 2010; and a letter from the IT Director, stating that the beneficiary was employed as a Biztalk Developer "for almost a year."

The director's decision denying the petition stated that the petitioner had not established that the beneficiary had the required experience as stated on the labor certification and that the petitioner had not established its ability to pay all of its sponsored Form I-140 beneficiary's the prevailing wage. The director also found that the beneficiary willfully misrepresented his claimed experience.

On appeal, the petitioner states that the beneficiary did not misrepresent his experience, that the beneficiary possesses the required experience and that the petitioner has established its ability to pay the beneficiary the proffered wage.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[3] The AAO considers all pertinent evidence in

[3] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v.*

the record, including new evidence properly submitted upon appeal.[4] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[5]

II. LAW AND ANALYSIS

The petitioner must establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a master's degree and three years of experience, or a bachelor's degree and five years of experience. As noted above, the beneficiary possesses a master's degree. Therefore, the petitioner must also establish that the beneficiary possesses the required three years of experience.

DOJ, 381 F.3d 143, 145 (3d Cir. 2004).

[4] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[5] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

As noted above, the beneficiary claims the following experience:

- Software Engineer with in Troy, Michigan from February 15, 2010 until September 10, 2010;
- Microsoft Tech Specialist wit n Stamford, Connecticut from February 5, 2009 until January 22, 2010;
- BizTalk Developer with in Mountain View, California from May 7, 2008 until February 4, 2009; and
- Software Engineer with in Troy, Michigan from April 1, 2005 until May 1, 2008.

The record contains an experience letter from the Vice President of stating that the beneficiary was employed as a software engineer from April 2005 to May 2008 and from March 2010 to September 2010; a letter from the Vice President of Operations of stating that the beneficiary was employed as a Microsoft Technologies Specialist from February 5, 2009 until January 22, 2010; and a letter from the IT Director, stating that the beneficiary was employed as a Biztalk Developer "for almost a year."

The letter from does not contain the beginning and end dates of employment and therefore this letter is insufficient to establish that the beneficiary has the claimed experience. Furthermore, the letter states that the beneficiary gained experience in BizTalk Server, C#, Visual Studio, Windows Server, SQL Server, BizTalk MultiServer Environment, BizTalk Server Accelerator for Rosetta Net, Microsoft ISA Server; however, as the letter does not contain the dates of employment, the letter is not sufficient to establish that the beneficiary had the required number of years of experience in the listed specific skills, as required by the terms of H.14 of the labor certification. We do note that the petitioner submitted the beneficiary's Form W-2 Wage and Tax Statement Transcript that was certified and issued by the Internal Revenue Service (IRS) showing that the beneficiary was paid during the 2008 and 2009 calendar years. However, this does not provide information on the dates of employment and cannot serve to confirm the actual length of employment.

The letter from meets the requirements of the regulation and corroborates the experience claimed on the labor certification. As such, the letter serves as evidence that the beneficiary has 11 months and two weeks of experience with this employer as a Microsoft Tech Specialist, which is less than the 36 months required by the labor certification. Specifically the letter, which only attests to 11 month and two weeks of experience, notes that the beneficiary has experience with BizTalk Server, C#, Windows Server, SQL Server, VB.Net, SharePoint Server, and SharePoint Services. This satisfies the labor certification requirement of 6 months of experience in SharePoint Server and SharePoint Services but does not meet the requirements of three years of

experience in BizTalk Server, C#, Visual Studio, Windows Server, BizTalk Business Activity Monitoring, BizTalk custom pipelines and custom adapters, SQL Server, VB.Net, and WCF, the requirement of two years' experience in Microsoft Host Integration Server or the requirement of six months' experience with BizTalk MultiServer Environment, BizTalk Server Accelerator for Rosetta Net, and Microsoft ISA Server.

Regarding the beneficiary's experience with the director identified several inconsistencies in the record and notified the petitioner of the inconsistencies and discrepancies in a notice of intent to deny (NOID). Specifically, on the labor certification the beneficiary states that he worked for from February 15, 2010 until September 10, 2010; however, the director notes that was registered in the State of Michigan on March 13, 2007 and was automatically dissolved on July 15, 2011 for failure to file their 2009 through 2011 annual reports. While may have failed to file their annual report for 2010, it was still an active corporation in Michigan in 2010, as it was not dissolved until July 15, 2011. The petitioner has also submitted other documentary evidence of existence as an operational compnay, including its corporate tax returns for 2009 and 2010, annual reports for 2009 to 2011, copy of renter's insurance policy, paystubs and Forms W-2 showing paying the beneficiary wages and evidence of other H-1Bs filed by with USCIS in 2010. The evidence in the record indicates that it is more likely than not that was conducting business in 2010 when the benficiary claims to have worked there.[6]

The director further noted that the experience letter from states that the beneficairy began working there in March 2010, not in February 2010 as reported on the labor certification. The record contains an affadavit from the beneficiary dated February 24, 2012 which states that the benficiary worked for from March 2010 to September 2010. The record does not contain an explanation for this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In response to the director's NOID, the petitioner submited paystubs from showing that the beneficiary was first paid on May 18, 2010 for a pay period running from March 1, 2010 to March 31, 2010 and last paid on October 6, 2010 for a pay period running September 1, 2010 to Septemebr 15, 2010. The petitioner also submitted the benefiicary's bank account statements showing electronic deposits from starting on May 18, 2010 (the payday for the March 1, 2010 to March 31, 2010 pay period) and ending on October 6, 2010. The petitioner futher submitted certified Wage and Income Transcripts from the Internal Revenue Service (IRS) for the beneficiary for 2010, confirming that the benficiary was issued a Form W-2 by for working during the 2010 calendar year. The paystubs, bank account statements, and certified tax transcripts serve as objective documentary evidence regarding the benficiary's employment dates with and indicate that the beneficiary was paid by for work between March 2010 and September 2010. However,

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[6] Whether or not was doing business as the beneficiary's employer has not been determined.

the record of proceeding fails to establish the beneficiary's start date, as he evidence provided only indicates a pay period of March 1 to March 31, 2010, and not the actual first day of employment.

The director also questioned role as the beneficiary's former employer. The director noted that during the time the beneficiary claims to have worked for he was actually working at third party client sites. The director concludes that as did not excerise control over the beneiciary's work, it was the third party clients, not that would be considered the beneficiary's prior employer and which would have first-hand knowledge of the beneficiary's work experience and skills. We also note, that as the record does not establish that was in a position to attest to the beneficiary's experience, the letter does not serve as sufficient evidence that the beneficiary has the required experience in the specific skills listed in section H.14 of the labor certification.

On appeal, the petitioner submits a letter from an Account Executive at , dated February 16, 2012 stating that he had personal knowledge of that he partnered with from March 15, 2010 to September 12, 2010, that employees provided software development to from March 15, 2010 to Septemebr 12, 2010, and that he witnessed the beneficiary providing services pursuant to the agreement between The petitioner also submits a letter from a Manager at the dated February 15, 2012, stating that the beneficiary had been serving as a contractor on their project based in Lake Oswego, Oregon since March 15, 2010. The letter describes the beneficiary's day-to-day-duties but also states "please note that no employer-employee relationship between exists between [the beneficairy] and has contracted with the firm which placed [the beneficiary]."

It appears that contracted with who placed employees, including the beneficiary, with from March 15, 2010 to September 12, 2010. While the letter from denies any employment relationship with the beneficiary, it appears to indicate that was the beneficiary's employer. At best, the record is unclear as to which company was actually controlling the beneficiary's work and which has the knowledge to attest to the beneficairy's experience.

Furthermore, the letter from is dated February 15, 2012 and states that the beneficiary has been employed "since March 15, 2010." This is inconsistent with the other dates of employment in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, the evidence in the record is insufficient to establish that the beneficiary has the claimed experience with from March 2010 to September 2010.

Regarding the beneficiary's employment with from April 1, 2005 to May 1, 2008, the director states that was not the beneficiary's actual employer during that time period and also concludes that the beneficiary willfully misrepresented the dates of his employment.

On the labor certification, the beneficiary claims to have been employed by from April 1, 2005 to May 1, 2008. The experience letter from confirms these dates of employment. In the director's NOID, the director notified the petitioner that according to the beneficiary's non-immigrant record, the beneficiary stated on an H-1B filing that he began working for in March 2006. From this, the director found that the beneficiary had misrepresented his prior experience on the ETA 9089. On appeal, counsel asserts that the beneficiary started working for in H-1B status in March 2006 and that prior to that he worked for in OPT tsatus. Counsel states that he while he does not have access to the benficiary's non-immigrant filings, the questions asked on the required H-1B Form I-129 pertain to the beneficiary reporting prior H-1B status; not a history of employment. As the beneficiary was granted H-1B status in March 2006, it is likely this date that he reported and this information therefore does not contradict the prior employment claimed on the ETA 9089. Counsel's assertions are supported by the beneficiary's non-immigrant record and we find that there has been insufficient development of the facts in order to support a finding of willful misrepresentation. Furthermore, the petitioner has submitted paystubs, bank records, and IRS Wage and Tax Transcripts for the beneficiary from 2005 through 2008, confirming that the beneficiary was first paid by on May 10, 2005 for the pay period running April 1, 2005 to April 30, 2005. Therefore, the petitioner has provided objective documentary evidence that appears to overcome the director's doubts about the beneficiary's employment start date.

However, as was discussed above, the evidence in the record does not establish that was the beneficiary's actual employer with the first-hand knowledge to attest to the benefiicary's claimed experience. The director therefore found that the letter from was not sufficient that the beneficiary had the required experience, because it was not clear from the record that controlled the beneficiary's work or that the signatory was in a position to attest to the beneficiary's experience and skills. In response to the director's NOID, the petitioner submitted an affadavit from a former BizTalk Developer with dated February 11, 2012, stating that he witnessed the beneficiary providing IT consulting services to between August 2006 and February 2008, and that he had personal knowledge of the business activity of

The letter states that the beneficiary worked at from August 2006 to February 2008; however, it appears to have been written by a coworker and not a supervisor or the former employer, and it does not discuss the beneficiary's duties, or hours worked. As such, this letter is insufficient to establish that the beneficiary gained the claimed experience from August 2006 to February 2008. The letter also does not address the beneficiary's experience in the specific special skills required by the labor certification. Furthermore, the record does not contain information or evidence concerning where the beneficiary was working from April 2005 to August 2006 or from February 2008 to May 2008.

Therefore, the submitted experience letters do not establish that the beneficiary possessed the required experience for the offered position. We concur with the director's finding that the petitioner has not established that the beneficiary has the required 36 months of experience in the job offered and further note that the record does not establish that the beneficiary has the amount of experience in the special skills that were required in box H.14 of the labor certification. However, the director's finding of fraud will be withdrawn. The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must be denied for this reason.

The petitioner must also establish its ability to pay the beneficiary the proffered wage from the priority date onward. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on September 9, 2011. The proffered wage as stated on the ETA Form 9089 is $91,978 per year. The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 and to currently employ 388 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on November 29, 2011, the beneficiary states that he has worked for the petitioner since September 13, 2010.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United

States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner demonstrated that it paid the beneficiary $83,500.12, in 2011 and $65,088.92 in 2012, which is $8,499.88 and $26,911.08, respectively, less than the proffered wage.[7] Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2011 and 2012.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

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[7] The instant labor certification states that the beneficiary has been employed with the petitioner fulltime in the proffered position since September 2010. The unexplained decrease in the beneficiary's salary between 2011 and 2012 casts doubt about the nature of the job opportunity and whether a *bona fide* fulltime job opportunity exists.

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on March 8, 2012 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny. As of that date, the petitioner's 2012 federal income tax return was not yet due. In response to an request for evidence from the AAO, the petitioner subsequently submitted its 2012 tax returns. Therefore, the petitioner's income tax return for 2012 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2011 and 2012, as shown in the table below.

- In 2011, the Form 1120S stated net income[8] of $2,360,819.
- In 2012, the Form 1120S stated net income of $1,618,291.

Therefore, for the years 2011 and 2012, it appears that the petitioner may have had sufficient net income to pay the proffered wage to the instant beneficiary.

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[8] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed August 20, 2013).

However, according to USCIS records, the petitioner has filed over 200 I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The record contains a chart documenting the priority date, proffered wage, wages paid, status of the petition and whether or not a beneficiary has become a legal permanent resident, for all other sponsored beneficiaries for 2010 and 2011. The record also contains IRS Forms W-2 issued to each beneficiary as evidence of the wages paid in those years. The priority date for the instant petition is in 2011, therefore, the information for 2010 is not material.

In the chart submitted by the petitioner for 2012, there are 289 Form I-140 petitions sponsored by the petitioner. In the chart previously submitted, the petitioner only disclosed 108 Form I-140 petitions. The discrepancy appears to be that the chart covering 2010 and 2011 only includes those petitions that were filed in 2010 and 2011, and does not include an analysis of all of the petitioner's outstanding wage obligations to beneficiaries whose petitions were filed prior to 2010 but who had not yet become legal permanent residents. Therefore, the information submitted for 2011 is incomplete and does not establish that the petitioner had the ability to pay in that year.

Also, in the 2012 chart, while it appears to be a more complete catalog of the petitioner's sponsored beneficiaries, the petitioner attempts to exclude all of the wages owed to beneficiaries who have become legal permanent residents and who are no longer employed by the petitioner. This is problematic because the petitioner must continue to show its ability to pay each beneficiary the proffered wage from the priority date of each petition until such time as the beneficiary becomes a legal permanent resident. Therefore, the date a beneficiary becomes a legal permanent resident is crucial to the calculation as the wage obligation continues until that time. Furthermore, the method the petitioner uses to calculate the outstanding wages owed to its sponsored beneficiaries does not accurately represent its outstanding wage obligations. The petitioner totals all of the wages paid to its sponsored beneficiaries in a year and then subtracts this total from the total proffered wages of its sponsored beneficiaries. This method allows the petitioner to use the overpayment of one beneficiary to offset the underpayment of another beneficiary. However, the wages that were paid to one beneficiary do not represent funds that were available to pay the wage of other beneficiaries and therefore will not be considered in analyzing the petitioner's ability to pay. Rather, we will calculate any outstanding wages owed to a beneficiary on an individual basis, total all wages owed and then compare this figure to the petitioner's net income and net current assets in order assess whether or not the petitioner has the ability to pay all of its sponsored beneficiaries the proffered wage for the years in question. However, as noted above, in the instant case, the information missing from the record precludes the AAO from making a positive determination on the petitioner's ability to pay in 2011 and 2012.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage.[9] In the instant case, as noted above, the record does not contain sufficient evidence concerning the petitioner's financial obligations to all its sponsored beneficiaries. This lack of information precludes the AAO from conducting a totality of circumstances analysis.

III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possessed the experience and specific skills required by the terms of the labor certification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. However, the facts in the record do not support a finding of fraud. The director's decision denying the petition is affirmed in part and withdrawn in part.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

FURTHER ORDER: The director's finding of fraud is withdrawn.

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[9] *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.